

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK CHRISTOPHER BENNETT,

Defendant-Appellant.

UNPUBLISHED

July 25, 2013

No. 310425

Wayne Circuit Court

LC No. 11-008505-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for second-degree murder, MCL 750.317, and sentence to life in prison. For the reasons set forth in this opinion, we affirm the conviction of defendant. We affirm defendant's sentence in part and remand for an evidentiary hearing regarding defendant's eligibility for credit for jail time served.

Defendant was arrested after two men flagged down a police officer and told the officer that defendant admitted that he killed his girlfriend, a homeless woman, by choking her. One of the men took police to the apartment of the woman in an abandoned housing project, where police found the woman dead. The medical examiner ruled that the cause of death was strangulation, and there was physical evidence the woman had been beaten and had fought for her life. A vodka bottle close to the makeshift bed had defendant's fingerprint on it, and there was some DNA evidence on a cord found near the body that did not exclude defendant.

Defendant confessed to killing the victim to Edward Diggs and Tim VanMeter, two people whom he knew from living and staying in and near the Brewster Projects. They also heard defendant state that he did not like being treated like a dog and that after killing the victim defendant had cleaned the scene of the crime. Another person to whom defendant allegedly also confessed the murder was a retired school teacher, Gwendolyn Mingo. Mingo did not know defendant prior to hearing his confession, but knew Diggs from having previously rented a room to him. Mingo testified that defendant came to her house and was calling her first name. She went outside to inquire as to what he wanted, and while standing on her steps, defendant stated: "I killed the bitch, I killed the bitch." She said, "That didn't happen; you didn't do that." He said, "Yes, I did. She [sic] laying over in Brewsters." He also said, "You don't have to worry about her any more." Mingo later went to the morgue and identified the victim.

Defendant was convicted of second-degree murder and sentenced to life imprisonment. On appeal, defendant first argues that the trial court abused its discretion by allowing the testimony of Mingo, who was endorsed as a prosecution witness but was thought to be testifying only with regard to the identification of the victim at the morgue. On the morning of the first day of trial, the prosecutor discovered that defendant also admitted the murder to Mingo and sought leave to elicit defendant's inculpatory statements through Mingo's testimony. Over defense objection, the trial court ruled that she could testify about defendant's statements to her but could not be called as a witness until defense counsel had an opportunity to interview her and prepare for her testimony.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). This Court also reviews a trial court's decision regarding a discovery violation for an abuse of discretion. MCR 6.201(J). Defendant's claim of a constitutional due process violation is reviewed de novo. *People v Jackson*, 292 Mich App 583, 590; 808 NW2d 541 (2011).

Defendant argues that the prosecution violated discovery rules by failing to produce Mingo's statement before trial. The Michigan Court Rules provide for mandatory disclosure of witness statements in criminal cases. MCR 6.201(A)(2) requires a party to provide to other parties "any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement[.]" However, the prosecution had no written or recorded statement of Mingo regarding defendant's statements to her. Although the prosecution endorsed Mingo as a witness, it had no knowledge of defendant's statements to her. Nothing in the record supports a finding by this Court that the prosecution had the statement prior to the first day of trial.

Defendant further argues that the prosecution was required to provide this statement under MCR 6.201(B)(3), which requires the prosecution, upon request, to provide discovery known to it of "any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial[.]" There is no record of defendant requesting statements. Further, the prosecution did not know of defendant's statement to Mingo prior to trial. Hence, the prosecution was not required to provide the defense with defendant's statement to Mingo before trial for the simple reason that the prosecution did not possess any statement made by Mingo.

However, the prosecution does have a continuing duty to disclose and promptly notify the defendant of additional information without further request. MCR 6.201(H). Our review of the record confirms that the prosecution complied with the requirements of MCR 6.201(H). The prosecution learned of defendant's statement to Mingo on the morning of the first day of trial and notified defendant and the trial court that morning. Although the prosecution did not violate discovery rules here, the court rules nevertheless give the trial court discretion to deal with discovery violations. Under MCR 6.201(J), the trial court has a wide range of methods to ensure that a defendant receives a fair trial. The trial court may order continuances; prohibit the introduction of the evidence, or enter other orders that are appropriate under the circumstances. When deciding on which course to take, the trial court must balance the interests of the public, the court, and the parties in light of all relevant circumstances. *People v Greenfield (On*

Reconsideration), 271 Mich App 442, 454 n 10; 722 NW2d 254 (2006). Further, the complaining party must show that the violation caused him or her actual prejudice. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). Here, the trial court ordered that Mingo could not testify until defense counsel had the opportunity to interview her. Mingo did not testify until the next day. Under the circumstances, the trial court did not abuse its discretion by allowing Mingo to testify with regard to defendant's statement after defense counsel had the opportunity to interview her.

Further, we cannot find that allowing the testimony of Mingo caused defendant to suffer any actual prejudice. Mingo was one of many people to whom defendant confessed killing the victim. While we are cognizant of defendant's argument that the other people to whom defendant confessed had a history of substance abuse which brought into question their credibility, and Mingo did not share that history, defendant was provided an opportunity through trial counsel to question Mingo prior to her testimony. Furthermore, Mingo had been listed as a witness and could have been questioned by trial counsel at any point prior to trial. As stated by this Court in *Greenfield (On Reconsideration)*, 271 Mich App at 454 n 10:

Unquestionably, a trial court has the inherent power to control the admission of evidence in order to promote the interests of justice. *People v Taylor*, 159 Mich App 468, 483; 406 NW2d 859 (1987). Yet it is equally true that the exclusion of otherwise admissible evidence is an extremely severe sanction that should be limited to egregious cases. *Id.* at 482-483, 487. Further, "[t]he trial court must also recognize that it 'has ample discretionary powers other than preclusion'. . . ." *Id.* at 482, quoting *People v Merritt*, 396 Mich 67, 79; 238 NW2d 31 (1976). Moreover, "[a] remedy which would put the objecting party in a better position than he would have enjoyed had disclosure been timely made would seem of dubious value, particularly if it does violence to other legitimate interests in the case." *Taylor, supra* at 487.

Based on this Court's prior reasoning set forth in *Greenfield*, we cannot conclude any prejudice arose from Mingo's testimony that would cause us to find reversible error had been committed.

Defendant also argues that his due process rights were violated by the late disclosure of defendant's statement to Mingo. The Michigan Supreme Court addressed a similar circumstance in *People v Elston*, 462 Mich 751; 614 NW2d 595 (2000). In *Elston*, a criminal sexual conduct case where the victim was a toddler, the prosecution provided the defendant with the emergency room medical report of the victim's examination, and the doctor who examined the victim testified at the preliminary hearing. Although there was a notation on the medical report of wet swabbing, the prosecution learned from the examining doctor on the morning of the first day of trial that the swabbing detected the presence of sperm and disclosed that fact the next day. The trial court denied the defendant's motion to suppress the evidence of sperm. *Id.* at 754-758. The *Elston* Court found that the defendant's due process rights were not violated by the late discovery of this evidence because the evidence was not exculpatory or favorable to the defendant under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). *Id.* at 762-763. Similarly, in this case, Mingo's testimony regarding defendant's inculpatory statement was not favorable to defendant under *Brady* and, therefore, defendant's due process rights were not violated by the testimony.

Next, defendant argues that the trial court erred by denying him credit for time served while awaiting trial and sentencing. Defendant was on parole from a Wisconsin sentence when the murder occurred. This Court reviews whether a defendant is entitled to credit for time served in jail before sentencing de novo. *People v Armisted*, 295 Mich App 32, 49; 811 NW2d 47 (2011).

Our Supreme Court addressed the issue of credit for time served while a defendant is awaiting trial, but on parole, in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009). In *Idziak*, the Court found that parolees who commit new felonies while on parole are not entitled to credit for time served because, “once arrested in connection with a new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction of the new offense.” *Id.* at 562.

The findings in *Idziak* were based on the statutes and procedures of parole in Michigan. *Idziak* relies on MCL 791.238(1), which provides that, while on parole, a prisoner is deemed to be in the legal custody and under the control of the Department of Corrections. *Idziak*, 484 Mich at 565. However, defendant was on parole from a sentence imposed in Wisconsin and, therefore, not under the legal custody and control of the Michigan Department of Corrections when he was arrested for a new offense. Because *Idziak* is based on Michigan Department of Corrections and Parole Board procedures and Michigan laws regarding parole, it is not applicable to this case.

While *Idziak* may not be applicable here, MCL 769.11b is, which provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

The question, then, is whether defendant was in jail before sentencing because he was “denied or unable to furnish bond.” In *People v Seiders*, 262 Mich App 702; this Court held that “a defendant who is on parole from a foreign jurisdiction and held in jail on a parole detainer is not entitled under MCL 769.11b to credit on his Michigan sentence for time served in jail before sentencing.” *Id.* at 707-708.

The record is not entirely clear regarding whether defendant was denied bond because of a parole hold from Wisconsin. Although the trial court file contains an “arrest ticket,” with an ink stamp indicating that defendant was on hold for a parole violation from the Wisconsin Department of Corrections, there is no record of whether Wisconsin was notified of defendant’s arrest and requested that hold or if the hold was placed there as a matter of course after reviewing his criminal record.

Because the record is incomplete with regard to this issue, this matter is remanded for an evidentiary hearing. If it is determined that defendant was held because of action taken by Wisconsin to assert their parole hold, then defendant is not entitled to credit for time served. If,

however, defendant was not held because of Wisconsin's action, then credit for time served should be granted.

Defendant's conviction is affirmed. His life sentence is also affirmed. We remand solely for an evidentiary hearing regarding the denial of credit for time served. We do not retain jurisdiction.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Michael J. Kelly